

heNORTH CAROLINA

## **FORGIVABLE LOAN AGREEMENT**

DURHAM COUNTY

THIS LOAN AGREEMENT is made and entered into this \_\_\_\_ day of \_\_\_\_\_ 2014 by and between Mathison Associates, L P, a North Carolina limited partnership whose mailing address is 1150-2 Executive Circle, Cary, North Carolina 27511 (the "Borrower") and the City of Durham, North Carolina (the "City").

WHEREAS, the Borrower has applied to the City for a forgivable loan to finance capital improvements to the Property, known as Mathison/Fiske Apartments (as hereinafter defined); and

WHEREAS, the City has agreed to make a loan to the Borrower provided that the Borrower complies with each term and provision of this Agreement and with each term and provision of the other "Loan Documents" as that term is defined hereafter; and

WHEREAS, as required by the City, the Borrower has agreed to secure this loan by a Deed of Trust which will constitute a third lien on the Property (as hereinafter defined);

NOW, THEREFORE, to induce the City to make a loan to the Borrower and to establish the mutual agreements and obligations of the parties, and in consideration of the recitals, covenants and promises set forth herein, the Borrower and the City agree as follows:

### ARTICLE I

#### Definitions

For purposes of this Agreement each of the following capitalized terms shall have the meaning specified with respect thereto:

1.1 Agreement: This Loan Agreement as the same may from time to time be amended.

1.2 Annualized Gross Income: will be defined and calculated using United States Department of Housing and Urban Development (HUD) Section 8 regulations, as may be revised from time to time by HUD.

1.3 Area Median Family Income: The amounts established by HUD as Median Family Income for the Durham Metro region, as they may be revised from time to time by HUD. See Attachment B, which is attached hereto and incorporated by reference.

1.4 Bonds: N/A

1.5 Borrower: The "Borrower" as defined in the recitals of this Agreement and any person, partnership or corporation hereafter acquiring title to or any interest in the security for the Loan.

1.6 City: The City of Durham, North Carolina.

1.7 City's Inspector: The City's employee or designee, including but not limited to any one or more architectural, engineering or consulting firms of the City's choice, to be engaged by the City, at its option and at the Borrower's expense, to examine and approve the Property, Improvements and all materials and services used thereon, the Plans, plan changes, cost breakdowns, progress of construction and all other matters relating to the construction of the Improvements and to review and approve all Draw Requests.

1.8 Code: The Internal Revenue Code of 1986, as amended, and the regulations thereunder.

1.9 Commitment: N/A

1.10 Completion Date: N/A

1.11 Construction Phase: N/A

1.12 Deed of Trust: All security instruments presently, or subsequently required by the City, including, but not limited to, the deed of trust, security agreements, financing statements and assignments of leases, all in form and content satisfactory to the City, securing the Loan indebtedness of Borrower to the City. The City's Deed of Trust shall constitute a second priority lien on the Property.

1.13 Draw Request: N/A

1.14 Dwelling Unit: A residence that includes cooking, sleeping and bathroom facilities and that is to be occupied on a year-round basis.

1.15 Eligible Tenant: Individuals earning 60% or less of the HUD-determined Median Family Income (as amended from time to time) for the Durham Metro region at time of initial occupancy. Each individual will be defined as a separate household for income verification purposes.

1.16 First Mortgage: Means the Loan Agreement and all related loan

documents, with the City of Durham, dated June 26, 2009.

1.17 Forgivable Loan: So long as no uncured Events of Default have occurred under any of the Loan Documents securing the Note, the loan principal amount of up to Seventy Nine Thousand Five Hundred Twenty Eight and no/100 Dollars (\$79,528.00) shall be forgiven in increments of one-fifteenth (1/15) each year during the Term, with each increment of forgiveness occurring on the anniversary date of the final Loan disbursement.

1.18 General Contractor: NA

1.19 Guarantor: None Required.

1.20 HOME Low Rent: N/A

1.21 HUD Fair Market Rent: As established annually by the U.S. Housing and Urban Development Department for the Section 8 program.

1.22 Improvements: The improvements and fixtures located at the Property, including improvements and related amenities to be created at the Property.

1.23 Land: That land at the northeast corner of Mathison Avenue and Potter Street identified by Durham County as PIN #0831-18-21-5646, and 925 Fiske Avenue, identified as PIN #0831-07-77-4517 and more particularly described in Exhibit A to the Deed of Trust.

1.24 Loan: The loan made by the City to the Borrower pursuant to the Loan Documents. The Loan shall provide second mortgage capital improvement financing at an interest rate of 0% and a term of 15 years.

1.25 Loan Documents: The collective reference to the Commitment, if any, this Agreement, the Note and the Deed of Trust and all other documents, approvals, waivers, opinions, policies, surveys and agreements required by the City as a term of agreeing to make the loan, or required by the terms of this Agreement to be submitted to the City.

1.26 Multi-Family Dwelling Unit: A Dwelling Unit of the type, located and otherwise as referenced in the Attachment A to this Agreement, which is incorporated herein by reference, and with respect to which the City agrees to make the Loan.

1.27 Note: The promissory note, in form and content required by the City, which evidences the Loan indebtedness of Borrower to the City.

1.28 Permanent Phase: N/A

1.29 Persons With Disabilities: N/A

1.30 Plans: N/A

1.31 Property: The collective reference to the Land, Improvements and all personal property and fixtures described in the Deed of Trust.

1.32 Mortgage Loan Program Servicing Agreement: The agreement between the City and a service provider to service mortgage loans by the City.

1.33 Second Mortgage: N/A

1.34 State: The State of North Carolina.

1.35 Title Assurances: N/A

1.36 Title Policy: N/A

1.37 Transitional Housing Unit: N/A

## ARTICLE II

### The Loan

2.1 Loan by the City: Subject to the terms and conditions provided in this Agreement and in the Loan Documents, and all applicable laws and regulations, the City agrees to make the Loan to the Borrower and the Borrower agrees to borrow up to Seventy Nine Thousand Five Hundred Twenty Eight Dollars (\$79,528.00) at zero percent (0%) interest, for a term of fifteen (15) years, as specified in the Note.

2.2 Draw Request: N/A

2.3 Evidence of Completed Construction:

(a) that there are no liens outstanding against the Property other than inchoate liens for property taxes not yet due and the First Mortgage.

(b) that the Borrower has complied with all of its obligations, as of the date thereof, under the Loan Documents;

(c) that all construction has been done in accordance with the plans.

2.4 Title Insurance Coverage: As provided for in Sections 3.13 and 6.12 (a)

- 2.5 Limits of Amounts of Disbursements: N/A
- 2.6 Amount of Disbursements: N/A
- 2.7 Notice, Frequency and Place of Disbursement: N/A
- 2.8 Deposit of Funds Advanced: N/A
- 2.9 Value of Work; Percentage Completion: N/A
- 2.10 Deposits by Borrower: N/A
- 2.11 Payments to General Contractor, etc.: N/A
- 2.12 Advances to Title Insurance Company: N/A
- 2.13 Advances Do Not Constitute a Waiver: N/A
- 2.14 City's Option to Employ Architect: N/A

2.15 Other Payments: In addition to Loan payments required of the Borrower under this Agreement, the Borrower agrees to make additional payments, at any time and from time to time until this Agreement is terminated, to the City for any and all costs, expenses and liabilities paid or incurred by the City, including reasonable fees of counsel and disbursements thereof in connection with the execution and delivery of this Agreement, the Deed of Trust or any of the other Loan Documents or paid or incurred by the City in satisfaction of any obligation of the Borrower hereunder which is not performed by the Borrower in accordance with the terms hereof in the Deed of Trust or any of the other Loan Documents. The Borrower shall also prepay or reimburse the City for any and all expenses, costs and liabilities paid or incurred, or to be paid or incurred, by the City or any of its officers, employees and agents, including reasonable fees of counsel and disbursements thereof, requested by the Borrower, or required by this Agreement, or incurred in enforcing the provisions of this Agreement, or incurred in defending any action or proceedings with respect to the Property or this Agreement, or arising out of or based upon any other document relating to this Agreement, which are not otherwise required to be paid by the Borrower hereunder.

2.16 No Warranty by City: The City does not make any warranty, either express or implied, that the proceeds of the Loan will be sufficient to pay all or any particular portion of the cost of the Improvements.

- 2.17 Covenants to Run with the Land: N/A

## ARTICLE III

### Conditions Precedent to Loan Disbursements

The City shall not be obligated to make the first Loan disbursement until all of the following conditions have been satisfied:

3.1 Instruments Received by the City: The City shall have received in form and substance satisfactory to the City and the City's counsel, all documents, approvals, agreements, authorizations, opinions, certifications, consents, waivers, surveys, insurance policies, licenses, photographs, schedules, projections and permits required by the Loan Documents and all other terms, conditions and requirements of the Loan Documents shall have been complied with by the Borrower.

3.2 No Event of Default: No uncured Event of Default, as hereafter defined, shall exist, and no event shall have occurred which, with the giving of notice, the passage of time or both shall constitute an Event of Default.

3.3 Borrower's Draw Request: N/A

3.4 Architect's and the City's Inspector's Approval: N/A

3.5 No Advance Without Building Permit: N/A

3.6 Pro-Rata Advances: N/A

3.7 No Additional Liens: No additional liens or other interest shall have been permitted to attach to the Property except taxes for the current year, if not then payable, and other matters acceptable to the City; and upon request by the City, the Borrower shall have the Title Policy insuring the City's lien on the Property brought up to date upon prior to Loan closing by issuance of an endorsement to the policy satisfactory to the City and Borrower shall provide to City all Title Assurances which the City may require;

3.8 Construction of Improvements: Construction of the Improvements has been conducted in a good and workmanlike manner, in substantial accordance with the Scope of Work, as specified in Attachment A, and the Improvements have not been materially damaged or injured, in the opinion of the City, by fire or otherwise;

3.9 Warranties: All warranties and representations referred to in Article 5 are true and correct.

3.10 Foundation Changes: If the foundation for any building constituting any of the Improvements has been modified or changed, the City shall have received an

updated as-built survey.

The City shall not be obligated to make the final loan disbursement until the following condition has been satisfied.

3.11 Completion of Improvements: The Improvements have been fully completed in a good and workmanlike manner and in substantial accordance with the scope of work.

3.12 Final As-built Survey: N/A

3.13 Title Policy: N/A

3.14 Required Documentation: N/A

#### ARTICLE IV

##### Additional Requirements

4.1 Permanent Phase: N/A

4.2 Exercise of Option to Convert Loan to Permanent Loan: N/A

4.3 Commencement of Permanent Loan: N/A

4.4 Permanent Phase Loan Terms: N/A

4.5 Use of Property: During such time after closing as the Borrower will own and lease or rent the Property or any part thereof, the Borrower shall require that:

(a) None of the Improvements will at any time (i) be used for any other purpose than rental housing, (ii) be used as a hotel, motel, dormitory, fraternity or sorority house, nursing home, hospital, sanitarium, rest home or trailer court or park or (iii) be rented for a lease period of less than six months.

(b) No Eligible Tenant will use any of the Improvements as an investment property.

(c) Unless permitted by the City in writing, the Improvements will not be used by any Eligible Tenant in such Eligible Tenant's trade or business, including the following uses:

(i) as a place that is used for the purpose of meeting or dealing with patients, clients or customers in the course of trade or business or that is

otherwise used for or in connection with any trade or business;

(ii) as a place where inventory is held for use in the trade or business of selling products at wholesale or retail;

(iii) as a place that is used in the trade or business of providing day care for children, for individuals who have attained the age of 65 or for individuals who are physically or mentally incapable for caring for themselves; or

(iv) for lease or rent to any other person.

(d) At all times during the term of this Agreement, no Improvements will be rented to an individual or family that is not an Eligible Tenant.

#### 4.6 Reporting Requirements

(a) During the term of this Agreement, the Borrower shall obtain from each prospective tenant, as computed at the time of such tenant's application for residence in the Improvements, a certification dated immediately prior to the application for residence of such tenant in the Improvements as to the Annualized Gross Income of such tenant, in a form acceptable to the City.

(b) The Borrower shall maintain complete and accurate records pertaining to the Annualized Gross Income of each Eligible Tenant residing in the Improvements and shall permit, upon five (5) business days' notice to the Borrower, any duly authorized representative of the City to inspect such records.

(c) The Borrower shall prepare and submit to the City a Certificate of Continuing Program Compliance executed by the Borrower stating (i) that all rental apartment units are occupied by Eligible Tenants and (ii) that no default has occurred under this Agreement or, if such a default has occurred, the nature of such default and the steps, if any, the Borrower has taken or proposes to take to correct such default.

(d) The Borrower shall also file with the City, on the first day of each calendar year, copies of the income certifications specified in Section 4.2(a) obtained by the Borrower during the previous year from all tenants residing in the Improvements.

(e) The Borrower shall also file with the City on an annual basis, copies of financial records for the property indicating the amount, the frequency and the total yearly contribution to the replacement reserve account. Borrower will make an annual contribution to the replacement reserve account of not less than \$250 per unit, per year,

4.7 Maintenance: During such time as the Borrower will own and lease or rent the Property, the Borrower will maintain the Property, both inside and outside, in a good



state of repair and preservation, except for ordinary wear or tear or obsolescence in spite of repair. The Borrower will not use or permit the use of any part of the Property for any unlawful purpose or permit any unsafe or unsanitary condition or nuisance to exist thereon.

Provided there is continued compliance with applicable laws and regulations of governmental authorities, the Borrower shall have the right to remodel the Improvements or make additions, modifications and improvements thereto, from time to time, which benefit the Improvements. The cost of which remodeling, additions, modifications and improvements shall be paid by the Borrower and which shall, when made, become a part of the Property.

4.8 Substitution or Removal of Portions of Property: The Borrower shall have the right from time to time to substitute personal property or fixtures constituting a part of the Property, provided that the personal property or fixtures to be substituted for the personal property or fixtures to be replaced shall be of comparable quality. Removal of any portion of the Property other than personal property or fixtures replaced in accordance with the preceding sentence shall be made only with the prior written consent of the City.

## ARTICLE V

### Borrower's Warranties

Borrower hereby warrants and represents to City as follows:

5.1 Validity of Loan Documents: The Loan Documents are in all respects legal, valid and binding in accordance with their terms and grant to the City a direct, valid and enforceable third lien on and security interest in and to the Property.

5.2 Priority of Lien on Personalty: No chattel mortgage, bill of sale, security agreement, financing statement or other title retention agreement has or will be executed with respect to any materials, fixtures, machinery, equipment or other personal property of the Borrower given as security for the Loan, without the prior written consent of the City.

5.3 Conflicting Transactions of Borrower: The consummation of the transactions hereby contemplated and the performance of the obligations of the Borrower under and by virtue of the Loan Documents will not result in any breach of, or constitute a default under, any mortgage, deed of trust, promissory note, lease, loan or credit agreement, partnership agreement or other instrument, document or agreement to which the Borrower or any Guarantor is a party or by which it is bound or affected.

5.4 Litigation: There are no actions, suits or proceedings pending or

threatened, against or affecting the Borrower or the Property, or involving the validity or enforceability of any of the Loan Documents or the priority of the lien and security interest thereof, at law or in equity, or before or by any governmental authority.

5.5 Violations of Requirements: The Borrower has no knowledge of any violations or notices of violations of any statute, law, ordinance, order, rule or regulation relating in any way to the Property, or of any other requirement described in Section 6.6.

5.6 Compliance with Requirements; Hazardous Waste: N/A

5.7 Availability of Utilities: N/A

5.8 Condition of Property: The Property has not been damaged or injured as result of any fire, explosion, accident, flood, spill, leak or disposal of a regulated substance as such term is defined under all applicable federal, state and local environmental statutes, rules, regulations or ordinances, or other casualty.

5.9 Brokerage Commissions: The Borrower has employed no brokers in connection with the Commitment or the Loan.

5.10 Financial Statements; Other Information: N/A

5.11 Status and Authority: (i) The Borrower is a for profit limited partnership duly organized, existing and in good standing under the laws of North Carolina, (ii) its articles of incorporation and any certificates of partnership or of assumed or business name have been delivered to the City and are in full force and effect and have not been amended or changed, (iii) no proceeding is pending, planned or threatened for the dissolution, termination or annulment of it, (iv) all articles of incorporation and of assumed or business name required to be filed have been duly filed and it has complied with all other conditions prerequisite to its doing business in North Carolina, (v) it has the power, authority and legal right to carry on the business now being conducted by it and to engage in transactions contemplated by the Loan Documents, and (vi) all necessary corporate actions of it have been duly taken.

5.12 Construction: N/A

5.13 Access: N/A

5.14 No Event of Default Under Loan Documents: No Event of Default by the Borrower exists under any of the Loan Documents, and no event has occurred and is continuing which, with notice or the passage of time or both, would constitute an Event of Default under any of the Loan Documents.

5.15 Sufficient Funds: Sufficient funds are available to the Borrower, in addition

to the proceeds of the Note, to pay all costs of construction of the Improvements in the manner required hereby.

5.16 Affirmation by Each Draw Request: N/A

5.17 Indemnification: To the fullest extent permitted by law, the Borrower releases the City from, agrees that the City shall not be liable for and agrees to hold the City and its officers, employees and agents harmless against: (a) any and all claims by or on behalf of any person arising in any manner whatsoever from or out of (1) any condition of the Property, (2) the construction, reconstruction, improvement, use, occupancy, conduct or management of or in any work or anything whatsoever done in or about the Property, (3) any accident, injury or damage occurring in or about the Property, (4) any breach or default by the Borrower of or in any of its obligations hereunder, (5) any environmental contamination of the Property where such liability arises under any applicable federal, state or local statute, rule, or ordinance including, but not limited to, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, or (6) any act or omission of the Borrower or any of its agents, contractors, servants, employees or licensees; and (b) any and all costs, counsel fees, expenses, liabilities, obligations, losses or damages incurred in connection with any such claim or any action or proceeding brought thereon. In case any action or proceeding which is brought against the City or any such officer, employee or agent by reason of any such claim, the Borrower, upon notice from the affected party, shall resist or defend such action or proceeding. Subject to the foregoing, the City shall cooperate and join with the Borrower at the expense of the Borrower as may be reasonably required in connection with any action taken or defended by the Borrower. In the event of a conflict between the provisions of this section and any other section of this Agreement, this section shall be deemed to be controlling.

Section 5.18. E-Verify Compliance. The Borrower represents and covenants that the Borrower and its subcontractors comply with the requirements of Article 2 of Chapter 64 of the North Carolina General Statutes (NCGS). In this E-Verify Compliance section, “contractor”, “its subcontractors”, and “comply” shall have the meanings intended by NCGS 160A-20.1(b). The City is relying on this E-Verify Compliance section in entering into this contract. The parties agree to this section only to the extent authorized by law. If this section is held to be unenforceable or invalid in whole or in part, it shall be deemed amended to the extent necessary to make this contract comply with NCGS 160A-20.1(b).

## ARTICLE VI

### Borrower's Covenants and Agreement

The Borrower covenants and agrees with the City as follows:

- 6.1 Payment, Noncommencement; Additional Documents: N/A
- 6.2 Commencement of Construction: N/A
- 6.3 Notice of Nonpayment: N/A
- 6.4 Correction of Defects; Changes to Plans: N/A
- 6.5 Subcontractors: N/A
- 6.6 Inspection by the City: Borrower to Furnish Plans; Receipts: N/A
- 6.7 Payment of the City's Expenses: N/A
- 6.8 Contract with General Contractor and Architects: Additional Contractors: N/A.
- 6.9 Foundation Survey: N/A
- 6.10 Financial Statement: N/A
- 6.11 Approval of Liabilities, Expenditures and Binding Commitments: Prior to payment in full of the Loan, the Borrower will not, without prior written consent of the City, incur any liability, make any capital expenditures or enter into any binding commitments of a material nature that would materially adversely effect its financial condition.
- 6.12 Insurance: The Borrower will obtain such insurance or evidence of insurance as the City's Risk Manager may reasonably require, including, but not limited to, the following:
- (a) Title Insurance. N/A
  - (b) Builder's Risk Insurance. N/A
  - (c) Hazard Insurance: All risk replacement cost insurance with the agreed amount endorsement and such other hazard insurance as the City may require with standard noncontributing mortgagee clauses and standard subrogation clauses. Such insurance is to be in such amounts and form and by such companies as shall be approved by the City's Risk Manager, the originals of which policies (together with appropriate endorsements thereto, evidence of payment of premiums thereon and written agreement by the insurer of insurers therein to give the City thirty (30) days prior written notice of intention to cancel) shall be promptly delivered upon completion of

construction of the Improvements and before any portion of the Property is occupied by the Borrower or any tenant of the Borrower, with such insurance to be kept in full force and effect at all times thereafter until the payment in full of the Loan.

(d) Public Liability and Worker's Compensation Insurance: A certificate from an insurance company indicating that the Borrower is covered by public liability and worker's compensation insurance to the satisfaction of the City's Risk Manager. The City of Durham must be named as additional insured on the liability policy. The certificate and the endorsement providing additional insured coverage must be originals. All insurance must be provided by companies with a Best rating of A or better and companies authorized to do business in North Carolina.

(e) Flood Insurance: N/A

6.13 Collection and Application of Insurance and Condemnation Proceeds: The Borrower will cooperate with the City in obtaining for the City the benefits of any insurance, condemnation or other proceeds lawfully or equitably payable in connection with the transactions contemplated hereby and to reimburse the City for any expenses incurred in connection therewith (including the payment by the Borrower of the expense of any independent appraisal on behalf of the City in case of a fire or other casualty or condemnation affecting the Property). All such proceeds shall be applied to the restoration of the Property or to the payment of the Loan as more particularly described in the Deed of Trust.

6.14 Application of Loan Proceeds: The Borrower will use the proceeds of the Loan solely for the purpose of paying for capital improvements specified in Attachment A.

6.15 Sign and Advertising Regarding Construction Financing: N/A

6.16 Notice of Occupancy: N/A

6.17 Books and Records: The Borrower will maintain accounting records for the Improvements, separate from any general accounting records which the Borrower may maintain in connection with the Borrower's general business activities. The Borrower acknowledges that the purpose of this provision is to facilitate determination of costs incurred with reference to the Improvements and the obligations of the Borrower in respect thereof. The Borrower agrees that the City shall, at any reasonable time, have access to and the right to examine all accounting records of the Borrower which relate directly or indirectly to the Improvements. It is expressly agreed that the reasonable cost to the City of the services of accountants which the City may employ, after a default or an Event of

Default under any of the Loan Documents, to make examinations of the Borrower's accounting records with reference to the Improvements, as the City shall determine to be necessary or appropriate in the protection of the City's interests, shall be an expense which shall be treated as an advance on account of the Loan. From and after the commencement of the Permanent Phase, the Borrower shall furnish the City with quarterly and annual operating statements for the Property sufficient to enable the City to verify the amount of income being generated by the Improvements and the expenses of the operation hereof.

6.18 Environmental Audit. The Borrower shall assess the Property and shall have concluded from the results of such assessment that there is no known environmental condition on or affecting the Property that would constitute a violation of any environmental law, statute, regulation, or ordinance.

(a) Soil Tests: N/A

(b) Compaction Tests. N/A

6.19 Administration of the Loan: The Borrower will comply, during the term of the Loan, with the City's requirements with regard to reporting procedures, and other matters related to the Loan and will utilize the City's forms in connection therewith

6.20 Secondary Financing and Alienation: During the Loan term there shall be (i) no sale or transfer of the ownership of the Property; and (ii) no changes in the structure of the Borrower without the City's prior written consent, which consent may be withheld in the City's complete discretion or be subject to such conditions as the City may impose, including the payment of transfer fees or increases in the interest rate due under the Note.

6.21 Operation of Residential Apartments: At all times following the completion of the Improvements, the Borrower shall operate the Improvements as residential rental units for occupancy by Eligible Tenants. The Borrower shall not discontinue the operation of the Property as residential rental units for Eligible Tenants. The City shall have the right to approve all managing agents employed by the Borrower to manage and operate the Property, which approval shall not be unreasonably withheld. The City recognizes Woodland Associates, Inc. as the current approved management agent.

6.22 Borrower Not to Adversely Affect Tax-exempt Status of Interest on Bonds: N/A

6.23 Opinion to be Provided: N/A

## ARTICLE VII

### Events of Default

The occurrence of any of the following events and the failure of the Borrower to cure or correct such event to the City's satisfaction within the applicable notice or grace periods, if any, shall from and after the expiration of the relevant notice or grace period, if any, constitute an Event of Default under the terms of this Agreement:

7.1 Borrower's Failure to Pay: The Borrower's failure to pay any installment payment of principal, interest, the Servicing Fee, if any, or any other payment as the same becomes due under the Note.

7.2 Default in Loan Documents: The Borrower's default under or failure to perform under the terms of any Loan Document and such default or failure to perform is not cured within thirty (30) days after notice of default has been given to the Borrower as provided in Section 9.11; provided, however, if a different notice and cure period is specifically provided in such Loan Document with respect to a specific default such different notice and cure period shall govern with respect to the specified default.

7.3 Inaccurate Representations: The invalidity or material inaccuracy of any warranty, representation or opinion in this Agreement or in any other Loan Document, or the breach, withdrawal, cancellation, rescission, termination or alteration of any agreement, approval, opinion or waiver submitted to the City as one of the Loan Documents, or the failure of Borrower to advise the City of any material act or information of which it has knowledge, with regard to the Property, the Loan or otherwise;

7.4 Breach of Covenant: The breach by the Borrower of any covenant or agreement contained in this Agreement or in any other Loan Document.

7.5 Deviation from Plans: Defective Workmanship: NA

7.6 Easements or Encroachments on Survey: The appearance on any survey furnished hereunder of easements or encroachments which have occurred without the written approval of the City.

7.7 Termination or Delay in Progress of Work: N/A

7.8 Claim of Lien: N/A

7.9 Injunction: The issuance of an order or decree in any court of

competent jurisdiction restraining, enjoining or prohibiting the construction of the Improvements or restraining, enjoining or prohibiting Borrower or the City from performing this Agreement, when the order continues in effect unstayed for a period of thirty (30) days.

7.10 Insurance Policies: The Borrower neglects, fails or refuses to obtain and to keep in full force and effect any insurance policies required by the City or any governmental permit or approval with respect to the construction of the Improvements and fails to restore such insurance or such approval or permit within ten (10) days after notice from the City.

7.11 Lawsuits: Any suit or administrative action shall be filed against the Borrower or any person or entity that is an equity owner (either directly or indirectly) of the Borrower which, if adversely determined, could substantially impair the ability of the Borrower to perform any of its or his obligations under and by virtue of the Loan Documents and such suit is not dismissed within sixty (60) days.

7.12 Misleading or Unfurnished Financial Statements; Adverse Change in Financial Condition of Borrower: Any representation or warranty submitted to the City concerning the financial conditions or credit standing of the Borrower proves to be materially false or misleading, or if the Borrower shall fail to furnish any financial information requested by the City, or, in the City's opinion, there shall occur a material adverse change in the financial condition or credit standing of the Borrower.

7.13 Priority of Deed of Trust: Other Liens: The Deed of Trust, in the opinion of the City's counsel, does not constitute a second priority and enforceable lien upon all of the Property or the status of the Deed of Trust as a third priority lien on the Property shall be challenged or endangered by any party whatsoever.

7.14 Failure to Commence or Complete Construction: N/A

7.15 Invalidity or Questioning of Permit or Compliance with Other Legal Requirements: Any permit, approval or consent or any building, zoning, environmental or other legal requirement of any governmental authority relating to the Property, the Improvements or the operation thereof is revoked or invalidated, or any of such matters is questioned by a proceeding by any board, commission, agency, court or other authority having jurisdiction thereof and such permit or approval is not restored or such proceeding is not dismissed within thirty (30) days after notice from the City to the Borrower.

7.16 Bankruptcy etc.: The Borrower shall (a) apply for or consent to the appointment of a receiver, trustee or liquidator of the Borrower or any of the Property, (b) file a voluntary petition in bankruptcy or admit in writing the Borrower's



inability to pay its or his debts as they become due, (c) make a general assignment for the benefit of creditors (d) file a petition or answer seeking reorganization or rearrangement with creditors who are taking advantage of any insolvency law, (e) file an answer admitting the material allegations of a petition filed against the Borrower or such similar proceeding, or (f) be the subject of order, judgment or decree entered by any court of competent jurisdiction, or by any other duly authorized authority, on application of a creditor or otherwise, adjudicating the Borrower as bankrupt or involvement or approving a petition seeking reorganization of the Borrower or appointing a receiver, trustee or liquidator of any of the Property, if such order, judgment or decree shall continue unstayed and in effect for any period of sixty (60) consecutive days. No additional notice shall be applicable to matters under this Section.

7.17 Dissolution, etc. of Borrower: The Borrower or any owner, either directly or indirectly, of an equity interest in the Borrower shall be dissolved, wound up, liquidated or otherwise terminated, or a party to any merger or consolidation without the written consent of the City. No notice or opportunity to cure shall be required for a default under this Section.

7.18 Transfer of Property or Interest in Borrower: If any interest in the Property is transferred or disposed of in any manner or there shall occur any change in the structure of the Borrower (or any equity owner, either directly or indirectly, of the Borrower), including without limitation, a change in partners, shareholders, or any change in the respective interests of any partner or shareholder thereof, unless such disposition or change is specifically permitted under this document, the City must give its prior written consent thereto. No notice or opportunity to cure shall be required for a default under this Section.

7.19 Impairment to Security: Any condition or situation which constitutes, in the City's judgment, a substantial danger or impairment to the security for the Loan (including the City's reasonable suspicion that one or more of the aforementioned Events of Default has occurred) and such condition or situation is not remedied within thirty (30) days after written notice to the Borrower to remedy such condition or situation.

## ARTICLE VIII

### City's Rights and Remedies

In the event of the occurrence of any Event of Default the City shall, in addition to all other remedies as may be provided by law or by any other Loan Document, be entitled to the following rights and remedies:

8.1 Acceleration of Note: No Further Disbursements: Upon the occurrence

of an Event of Default, the entire unpaid principal balance of the Loan, including all accrued interest shall, at the option of the City and without notice to the Borrower, become immediately due and payable and the City shall be under no obligation to make any further disbursements of Loan proceeds hereunder. The Borrower shall continue to be obligated to perform all duties and obligations under the Loan Documents despite any decision by the City to cease disbursements of Loan proceeds.

8.2 Assignment of Construction Related Contracts: N/A

8.3 Payments by the City in the Event of Dispute: N/A

8.4 Appointment of Receiver: The City shall be at liberty immediately upon any Event of Default to apply for and shall be entitled as a matter of right, without regard to the value of the Property or to the solvency or insolvency of the Borrower, to the appointment of a receiver to collect the rents and profits of the Property and/or to manage and operate all or part of the Improvements and with the power to sell the Property under order of Court and to apply the net proceeds of the sale toward the payment of the debt secured by this Deed of Trust.

8.5 Remedies Cumulative: All remedies of the City provided for herein are cumulative and shall be in addition to any and all other rights and remedies provided or available at law or in equity. The exercise of any right or remedy by the City hereunder shall not in any way constitute a cure or waiver of default hereunder or under the Note, the Deed of Trust or any applicable Loan Document, or invalidate any act done pursuant to any notice of default, or prejudice the City in the exercise of any of its rights hereunder or under the Note, the Deed of Trust or any applicable Loan Document. No delay or omission to exercise any right or power accruing upon any default shall impair any such right of power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient.

8.6 Assignment by the City: The title, interest, right and power granted herein by the Borrower to the City shall inure to the benefit of anyone to whom the City shall assign the indebtedness herein secured, as well as to the successors and legal representatives of the City.

8.7 Liability of the City: Whether or not the City elects to employ any or all remedies available to it on occurrence of an Event of Default, the City shall not be liable for the construction of or failure to construct or complete or protect the Improvements or for payment of any expense incurred in connection with the exercise of any remedy available to the City or for the construction or completion of the Improvements or for the performance or non-performance of any other obligation of the Borrower.

8.8 Security Interest in Reserves, etc.: It is understood and agreed that the City shall have and enjoy, and is hereby granted a lien on and a security interest in, (a) all unpaid contributions, equity payments and other funds due the Borrower, or other equity owners of the Borrower and (b) any and all reserves, deferred payments, insurance refunds, impound accounts, refunds for overpayment of any kind, and any surplus or withheld funds or funds or payments owing from any party to the Borrower arising out of or occurring in connection with the construction of the Improvements, and such lien and security interest shall constitute additional security for the indebtedness of the Borrower evidenced by the Note, and upon the occurrence of any default hereunder the City shall have and possess any and all remedies of a secured party provided by law with respect to enforcement of and recovery on its security interest on such items and amounts.

8.9 Access to Books: The City may have access to and inspect, examine and make copies of the books and records and any and all accounts, data and tax returns of the Borrower.

## ARTICLE IX

### General Conditions

The following terms and covenants shall be applicable throughout the term of this Agreement:

9.1 No Waiver: No waiver of any Event of Default or breach by the Borrower hereunder shall be implied from any delay or omission by the City to take action on account of such default, and no express waiver shall affect any default other than the default specified in the waiver, and it shall be operative only for the time and to the extent therein stated. Waivers of any covenant, term or condition contained herein must be in writing and shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition. The consent or approval by the City to or of any act by the Borrower requiring further consent or approval shall not be deemed to waive or render unnecessary the consent or approval to or of any subsequent or similar act. No single or partial exercise of any right or remedy of the City hereunder shall preclude any further exercise thereof or the exercise of any other or different right or remedy. The City may, at any time, extend the payment of the Loan and any extensions so granted shall be deemed made in pursuant of this Agreement and are not to be modifications thereof and shall not in any way adversely affect the priority of any of the Loan Documents.

9.2 No Third Party Beneficiaries: This Agreement is made and entered into for the sole protection and benefit of the City the Borrower and their successors and assigns, and no other person or persons shall have any right to action hereon

or rights to the Loan funds at any time, nor shall the City owe any duty whatsoever to any claimant for labor performed or material furnished in connection with the construction of the Improvements, or to apply any undisbursed portion of the Loan to the payment of any such claim, or to exercise any right or power of the City hereunder or arising from any default by the Borrower.

9.3 Joint and Several Liability: All persons, firms and/or entities identified by the designation "Borrower" herein shall be jointly and severally liable to the City for the faithful performance of the terms hereof.

9.4 Heirs, Successors, Assigns, Assignment: The terms hereof shall be binding upon and insure to the benefit of the heirs, successors, assigns and personal representatives of the parties hereto; provided, however, that the Borrower shall not assign this Agreement or any of its rights, interests, duties or obligations hereunder or any moneys to be advanced hereunder in whole or in part without the prior written consent of the City and that any such assignment (whether voluntary or by operation of law) without said consent shall be void. It is expressly recognized and agreed that the City may assign this Agreement, the Note, the Deed of Trust and any other Loan Documents to any other person, firm, or legal entity provided that all of the provisions hereof shall continue in force and effect. In the event of such assignment, the City shall thereafter be relieved of all liability hereunder and any Loan disbursements made by any assignee shall be deemed made in pursuance and not in modification hereof and shall be evidenced by the Note and secured by the Deed of Trust and any other Loan Documents.

9.5 Definitions: Whenever the context and construction so require, all words used in the singular number herein shall be deemed to have been used in the plural, and vice versa, and the masculine gender shall include the feminine and neuter and the neuter shall include the masculine and feminine. References to a "Section" or "Article" shall mean a section or article of this Agreement unless otherwise expressly stated.

9.6 Business or Commercial Purposes: The Borrower warrants that the extension of credit evidenced by the Note secured hereby is solely for business or commercial purposes, other than agricultural purposes.

9.7 Governing Law: This Agreement shall be deemed to be a contract made under the laws of the State and for all purposes shall be governed by and construed in accordance with the laws of the State and any litigation relating to this Agreement shall be brought in a court in the State, with venue in Durham County.

9.8 Severability: Invalidation of any one or more of the provisions of this Agreement shall in no way affect any of the other provisions thereof, which shall remain in full force and effect.

9.9 Counterparts: This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument, and in making proof of this Agreement, it shall not be necessary to produce or account for more than one such counterpart.

9.10 Captions: The captions herein are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope of this Agreement nor the intent of any provision hereof.

9.11 Notices: When any notice or consent is required or permitted to be given under the terms of this Agreement or under applicable law, such notice or consent shall be in writing and shall be effective only upon the earlier of (i) actual receipt by the party to whom notice is given or (ii) 48 hours after deposit in registered or certified United States Mail. Such notice shall be given by personal delivery or sent by certified mail, return receipt requested, and addressed as follows:

To Borrower: James W. Pou, Manager  
Mathison Associates, L P  
c/o Woodland Associates, Inc.  
1150-2 Executive Circle  
Cary NC 27511  
919-469-0260 ph  
919-469-9980 fax

To City: Director,  
Department of Community Development  
807 E. Main Street  
Suite, 2-200  
Durham, North Carolina 27701  
919-560-4570 ph.  
919-560-4090 fax

or to such other persons or addresses as the parties may, from time to time, establish in writing.

9.12 Survivability: The Borrower's obligations, warranties and representation under Article IV, V and VI shall survive a default or breach by the Borrower hereunder whether or not such default or breach leads to the termination of this Agreement.

9.13 No Discrimination. The City of Durham opposes discriminate on the basis of race and sex and urges all of its contractors and Borrowers to provide a fair opportunity for minorities and women to participate in their work force and as

subcontractors and vendors under City contracts and loans.

9.14 Exercise of Functions. Notwithstanding anything to the contrary contained in this Agreement, nothing contained in this Agreement shall in any way estop, limit or impair the City from exercising or performing any regulatory, policing, legislative governmental or other powers and functions with respect to the Property pursuant to applicable law.

9.15. No Partnership. Nothing in this Agreement is intended or shall be considered to create a joint venture or partnership between the City and the Borrower or constitute either the agent of the other or to make the City in any way responsible for the duties, responsibilities, obligations, liabilities, debts or losses of the Borrower.

9.16 Limited Capacity of City under this Agreement. The Borrower understands and acknowledges that with respect to the City's Mortgage Loan Programs, under which the Loan is being offered by the City to the Borrower, the City is acting in a limited capacity only as a mortgage lender and is not otherwise responsible in any way with respect for the construction, operation or maintenance of the Property. The Borrower further understands and acknowledges that the Borrower is responsible for contracting with any other person with respect to the construction, operation or maintenance of the Property, that the Borrower is responsible for determining that the Improvements have been constructed or will be constructed, and thereafter operated and maintained, in accordance with all applicable requirements of law and that the Borrower is responsible for its obligations to any other person with respect to the construction of the Improvements.

9.17 Whole Agreement. This Agreement, including the Loan Documents and all exhibits attached hereto, shall be the whole agreement between the City and the Borrower with respect to the matters herein.

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**IN TESTIMONY WHEREOF**, the parties hereto have caused this Agreement to be executed this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

**City of Durham**

By \_\_\_\_\_  
Thomas J. Bonfield, City Manager

ATTEST:  
CITY OF DURHAM

\_\_\_\_\_  
City Clerk

**Mathison Associates, L P**

By: JWPM LLC, General Partner

By \_\_\_\_\_  
James W. Pou, Manager

**NORTH CAROLINA  
DURHAM COUNTY**

I, \_\_\_\_\_ a Notary Public in and for the aforesaid County and State certify that \_\_\_\_\_ personally appeared this day, and acknowledged that he or she is the \_\_\_\_\_ City Clerk of the City of Durham, a municipal corporation, and that by authority duly given and as the act of the City, the foregoing contract or agreement was signed in its corporate name by Thomas J. Bonfield its City Manager, sealed with its corporate seal, and attested by its said City Clerk or Deputy City Clerk. This the \_\_\_\_\_ day of \_\_\_\_\_, 2014.

\_\_\_\_\_  
Notary Public

My Commission Expires  
\_\_\_\_\_



**NORTH CAROLINA  
DURHAM COUNTY**

I, \_\_\_\_\_ a Notary Public in and for the aforesaid County and State, certify that James W. Pou personally appeared before me this day, and acknowledged that he is the Manager of JWPM LLC, a North Carolina limited liability corporation, the general partner of Mathison Associates, L P, a North Carolina limited partnership, and that by authority duly given and as the act of the Limited Partnership, the foregoing Agreement with the City of Durham was signed in its name on behalf of and as an act of the partnership. This the \_\_\_\_\_ day of \_\_\_\_\_, 2014.

\_\_\_\_\_  
Notary Public

My Commission Expires  
\_\_\_\_\_

This instrument has been pre-audited in the manner required by the Local Government Budget and Fiscal Control Act. This the \_\_\_\_\_ day of \_\_\_\_\_, 2014.

\_\_\_\_\_ Finance Officer

## Attachment A

### Scope of Services

The City of Durham General Funds in the amount of up to \$79,528.00 will be used as a forgivable loan to cover capital improvement costs for necessary replacements at Mathison and Fiske Apartments. The properties are located at 1401 Mathison Avenue and 925 Fiske Avenue in Durham and consists of 9 units of housing for persons whose income does not exceed 60% of the Area Median Income. It is anticipated that the use of these funds will be as specified below to reflect the current highest repair or replacement needs of the property. During this course of this contract, should the Borrower determine that other higher priority repair or replacement needs, or additional repair needs are necessary, or the estimated costs of any item specified below should vary by more than 10%, Borrower may request permission for such changes in writing, addressed to the Director of the Department of Community Development. Permission for such changes will not be unreasonably withheld.

The Borrower shall have a period of eighteen (18) months from the date of this Agreement to complete the repairs and/or replacements of the following capital improvements.

<u>Use of Funds</u>	<u>Estimated Cost</u>
Replacement of approx. 2 HVAC units	\$7,920.00
Repair/Replace roof	5,500.00
Appliance Replacement	2,514.00
Floor Covering Replacement	7,407.00
Cabinetry Replacement	16,120.00
Plumbing (replace water heaters and toilets)	1,720.00
Window replacement	660.00
Painting	2,780.00
Paving (asphalt paving, French drain, sidewalks, steps and rails)	24,030.00
Site Improvements (retaining wall repair, landscaping)	6,742.00
Upgrade/Install Accessibility Features	<u>4,135.00</u>
<b>Total</b>	<b>\$79,528.00</b>

1. **Payments.** The maximum billable amount under this Contract shall be \$79,528.00. Reimbursement of the above eligible costs are subject to the submittal of documentation of the expenses incurred, with such documentation

to be as the Director of the Department of Community Development may reasonably require.

2. **Enforceability.** All terms of this Contract shall continue to be enforceable by the City so long as any obligations of Mathison Associates, LP under this Contract have not been fulfilled.
3. **Replacement Reserves.** Borrower must make a contribution of not less than \$250 per unit to the replacement reserve account each year to ensure that sufficient funds will be available for projected capital improvements anticipated over the next 20 years, as specified in Attachment C. Community Development staff will monitor this project each year to ensure that developer is making at least the minimum contribution to the replacement reserve account.

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## **Attachment B**

### **Durham-Chapel Hill, NC MSA 2014 Income Limits Adjusted for Family Size**

Income	1 Person	2 Person	3 Person	4 Person	5 Person	6 Person	7 Person	8 Person
50% AMI	\$23,000	\$26,300	\$29,600	\$32,850	\$35,500	\$38,150	\$40,750	\$43,400
60% AMI	\$27,600	\$31,560	\$35,520	\$39,420	\$42,600	\$45,780	\$48,900	\$52,080
80% AMI	\$36,800	\$42,050	\$47,300	\$52,550	\$56,800	\$61,000	\$65,200	\$69,400

Based on U.S. Department of Housing and Urban Development Income Limits for  
Section 8 Programs and Median Family Income for  
City/County Durham, North Carolina for Fiscal Year 2014.